1994

Andrew Berry, Jr v. Michael K. Coons : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREW BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiff/Appellant, vs. MICHAEL K. COONS, Defendant.	**BRIEF OF APPELLANT** Appeal No. 940342CA Civil No. 920600128 Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH, THE HONORABLE DAVID L. MOWER PRESIDING

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I.

PARTIES TO THIS PROCEEDING

All the parties to this proceeding are identified in the caption.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2a-3(2)(k). The Utah Supreme Court transferred this case to the Utah Court of Appeals on or about June 6, 1994.

V.

ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

The issues presented for review are:

1. Whether under the particular facts of this case not in dispute and as testified to by the appellee and his expert witness, the appellee was to some degree negligent?
2. Whether the lower court's failure to require appellees to satisfactorily explain improper juror conduct warrants a new trial?
3. Whether appellee's counsel's appeal to sympathy in his opening argument and subsequent questioning, warrant a new trial?
4. Whether the lower court erred in not granting a directed verdict and in not granting a judgment notwithstanding the verdict or in the alternative a new trial?

Issues Nos. 1 and 4 are reviewed under a substantial evidence standard. The appellate court views all evidence in the light most favorable to the verdict. The verdict will be reversed if there is insufficient evidence to support it. E.g., Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799 (Utah 1991); Kilpack v. Wignall, 604 P.2d 462, 463 (Utah 1979). However, the reviewing court may reassess a witness' credibility when, as in this case, some testimony was inherently improbable. State v. Workman, 852 P.2d 981, 984 (Utah 1993).

Issue No. 2 is reviewed under an abuse of discretion standard, but when improper juror contact occurs, it is presumed prejudicial. State v. Swain, 835 P.2d 1009, 1010 (Utah App. 1992).

Issue No. 3 is reviewed de novo. A ruling court will reverse if the court concludes that the argument was improper and prejudicial. See also, Ostler v. Albina Transfer Co., 781 P.2d 445, 400 (Utah App. 1989).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS STATUTES, ORDINANCES, RULES AND REGULATIONS

The determinative statues and rules are Utah Code Ann. §§ 41-6-46(1) and 41-6-80. The determinative rules are Rule 59(a)(1), (2), (6) and (7) of the Utah Rules of Civil Procedure. Copies are attached in the Addendum.

VII.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition in the Lower Court.

Andrew Berry as the guardian of a 4½-year-old child, Reynold Johnson (hereinafter "Johnson" or "the Johnson child"), sued Michael K. Coons ("Coons") for negligence as a result of a collision between Coons in a van and trailer and Johnson on a small bicycle (R. 1-4). Coons testified that as he travelled north he saw Johnson on the west side of the road. He did not slow down, and he took his eyes off of Johnson for two to three seconds so that he did not see the child crossing the road until it was too late to avoid impact. A divided (6-2) Sanpete County jury found that Coons was not negligent (R. 213). Johnson's Motion for a Directed Verdict and Motion for a Judgment Notwithstanding the Verdict Or in the Alternative a New Trial (R. 229-252), were all denied by the lower court (R. 327-328). Johnson timely filed a Notice of Appeal on January 25, 1994 (R. 323-326). The Utah Supreme Court transferred the appeal to the Utah Court of Appeals on June 6, 1994.

B. Statement of the Facts Relevant to the Issues Presented for Review.

This case is the result of an auto/pedestrian accident that occurred on Manti's Main Street, just sourth of 4th North, on

October 27, 1989 around 6:00 p.m. (R. 1-4); Transcript of Proceedings, August 4-6, 1993, Vol. I, p. 123, lns. 17-25; 154; 176, hereinafter "Tr. Vol. I, p. ____"). At the time of the accident, there was plenty of light, visibility was excellent, and the road was dry (Tr. Vol. I, p. 200, lns. 19-20; p. 201, lns. 2-4, 19-20).

Reynold Johnson, a 4½-year-old child, lived on Main Street near 4th North. On the day of the accident, he was across the street playing with some friends. Michael Coons was driving his van, traveling north on Main Street. His cruise control was set for 30 m.p.h. (Tr. Vol. I, pp. 190-191, 133-134, 137, 158-159, 200; Tr. Ex. 34).

At trial, Coons admitted that he saw Johnson and his playmates:

> Mr. Coons: A: [I] didn't just observe -- observe him . . . . There were a couple of kids with him on the west side . . . . [T]here were also some kids running around on the . . . east side.

(Tr. Vol. I, p. 201, lns. 24-25).

Coons admitted that he is "not good at distances," so he had difficulty in estimating how far away he was from the children when he first saw them (Tr. Vol. I, p. 202, lns. 14-25). When his published deposition was taken, he testified that he was a half

block away, and made a drawing showing his location (Tr. Vol. II, p. 204, lns. 3-24). The drawing was trial Exhibit 31. A Manti city block is 482 feet (Tr. Vol. II, p. 489, lns. 16-20), so Coons was approximately 241 feet away. In contrast, Coons testified at trial that he may have been 100 feet away when he first saw the child and only 25 feet away when he saw him crossing the street (Tr. p. 203, lns. 2-11; p. 224, lns. 2-7). In so testifying, Coons was mistaken. Coons' accident reconstructionist did not believe Coons' testimony:

Mr. Wells:	Q:	Do you believe it's accurate when he says 25 feet south of the intersection?
Mr. Knight:	A:	No.
	*	* *
	A:	No. We went through that before. Because at 25 feet, when he's 25 feet away, you see that the speed of the boy, has to be too great for them to close, and we agreed to that before. But he says, "I see the boy coming" and his description of 25 feet is probably in error."

(Tr. Vol. II, p. 487, lns. 8-16.)

Johnson's accident reconstruction expert also disbelieved that Coons was only 25 feet away from Johnson when Coons first saw the child in the road.

Mr. Wells: Q: So do you have an opinion as to whether or not the testimony of Mr. Coons that he was 25 feet south at the intersection when he saw Ren at point -- some point off at 10:00 o'clock in time?

Mr. Beaufort: A: I do.

Q: And what is that opinion?

A: It's not true.[1]

(Tr. p. 282, lns. 10-16.)

The reason Coons was mistaken and the accident reconstructionists did not believe him was because it was physically impossible to have a collision if Coons first saw the boy in the road near the point of impact. Main Street is 62½ feet wide (Tr. Ex. 36). The collision occurred when the child rode his bicycle east across Main Street and collided with the trailer pulled by Coons (Tr. Exs. 22, 23, 24, 33; Tr. Vol. I, pp. 179-180). Both sides' accident reconstructionists determined that the point of impact was 55 feet east of the west curb.

---

[1]The witness subsequently demonstrated to the jury how it was physically impossible for Coons to first see the child in the road 25 feet away and have a collision (Tr. Vol. II, pp. 279-282).

Mr. Beaufort: A: The distance is 55 feet . . . to the point of impact.

* * *

Mr. Sorenson: Q: So you agree with Mr. Beaufort? Fifty-five feet over to the point of impact?

A: Yes.

(Tr. Vol. II, p. 285, lns. 2-10; p. 402, lns. 11-14.)

Using a bicycle virtually identical to Johnson's bicycle[2], and a 4½-year-old child going as fast as he could, Johnson's accident reconstructionist determined that it took a minimum of 6.1 to 7.8 seconds for Johnson to reach the point of impact. In other words, Johnson's maximum speed was 10.7 feet per second, and probably 7 to 9 feet per second (Tr. Vol. II, p. 268, lns. 16-25; p. 269; p. 270; p. 273, lns. 5-24; p. 285). One of Coons' accident reconstructionists agreed that Johnson's speed was 7.7 to 10.7 feet per second.

Mr. Knight: A: The second and third opinions that I had was that if the bike is going from 7.7 to 10.7 feet per second, that gave me a relative speed of the bike, and that's what Mr. Beaufort testified to.

---

[2]The only difference in the bike that was tested and Johnson's bike was that Johnson's bike had an 11-inch wheel, whereas the tested bike had a 12-inch wheel. Beaufort made the mathematical adjustments before calculating the distance and speed traveled by Johnson (Tr. p. 269, lns. 3-11).

(Tr. Vol. II, p. 460, lns. 4-5.)

Coons' other accident reconstructionist demonstrated that an older boy (6 years old) on a bigger bike (16-inch wheels) could go 9 to 14 feet per second (Tr. pp. 372, 373, 377, 395, 399). However, on cross-examination, he admitted that Johnson's expert's data was more reliable and more precise because he used a 12-inch wheel bicycle and a 4½-year-old child to run the test.

Mr. Wells: Q: And don't you believe that using a 4½-year-old on a near identical bike would produce more reliable data than using a 6-year-old on a bigger bike?

Mr. Sorenson: A: It would be more reliable. I still feel that my data is quite reliable . . . . It's very close to Mr. Beaufort's.

* * *

Q: True, the data using the actual equivalent bike is more reliable.

A: It would be more precise. But it's still within a range of my data.

Q: I understand. He's talked about ranges. But it is more precise?

A: Yes.

(Tr. Vol. II, p. 399, lns. 17-25; p. 400, lns. 1-10.)

Newell Knight, Coon's other expert, explained that the only evidence of Coons' speed was Coons' testimony that he set his speed control at 30 m.p.h. (Tr. Vol. II, p. 455). At 30 m.p.h., Coons was going 45 feet per second (Tr. Vol. II, p. 489, lns. 11-

12). Since it took the Johnson child a minimum of 6.1 to 7.8 seconds to reach the point of impact (Tr. p. 285), Coons had to be at least 274-351 feet away when he first saw the children playing near the side of the road (45 feet x 6.1 to 7.8). Again, Coons' accident reconstructionist concluded that Coons was at least 207 feet away when he saw the children.

> Q: [I]f he [Coons] went 30 [m.p.h.] that whole time, he'd be down somewhere close to the middle of the block when Ren [Johnson] was out there; isn't that correct?
>
> A: 207 feet away it says.

(Tr. Vol. II, p. 489, lns. 20-25.)

In summary, any disciplined review of the evidence and testimony shows that when Coons first observed the Johnson child and his playmates, Coons was approximately a half block away or more than 200 feet.

When Coons observed the children on the side of the road, he was well aware that children do unexpected things.

> Mr. Wells: Q: Have you ever seen kids do something unexpected?[3]
>
> Mr. Coons: A: Sir, we've all, as children, done things unexpected.
>
> Q: So don't you think it would be prudent when

[3]Every expert witness who also testified said that children do unexpected things and that drivers should proceed with caution.

you're driving along and you see kids along the road, to keep your attention on them until you are past them?

A: I sure do.

(Tr. Vol. I, p. 244, lns. 2-8.)

Nevertheless, Coons did not keep his eyes on the children.

Q: You then proceeded to run a mirror check, didn't you?

A: I do that constantly . . . . I do that all the time (Tr. Vol. I, p. 205, lns. 9-14).

* * *

Q: How much time do you think you spent clearing your mirrors . . . more than one second?

A: Yes, sir.

Q: More than two seconds?

A: Yes, sir.

Q: More than three seconds?

A: No, sir.

Q: Somewhere between two and three seconds

A: Yes, sir.

(Tr. Vol. I, p. 222, lns. 9-25; p. 223, lns. 1-7)?

As a result of taking his eyes off of the children for two to three seconds, Coons did not see the Johnson child begin to travel east across the road on his little bike.

Q: [Y]ou did not see him [Johnson] start up, did you?

A: No, sir.

Q: You didn't see him cross the plane of the west side of Main Street, did you?

A: No, sir.

Q: And you didn't see him come across until he got to Point D [one-third of the way across the street], did you?

A: No, sir, I didn't.

* * *

Q: [A]ll I'm trying to establish is that I want you to admit that whatever period of time it took him [Johnson] to get from stop at Point B [west of Main Street] to whatever period of time it took for him to go from stop to Point B to however fast he was going at D [one-third of the way across the street] -- .

A: Yes.

Q: You weren't looking ahead to where you could see what he was doing?

A: No, sir, I wasn't.

(Tr. Vol. I, p. 219, lns. 2-15; p. 229, ln. 25; p. 230, lns. 1-6).

Coons also admitted that had he paid attention to the children so as to see the child start to cross the street, he could have avoided the accident.

> **Q:** Do you believe if you had seen Ren [Johnson] sooner you could have avoided the accident?
>
> **A:** Only if I had been able to see him [the Johnson child] as he started to go.

(Tr. Vol. I, p. 240, lns. 18-21).

Not only did Coons fail to pay attention to the children, he did not slow down when he first observed them.

> **Q:** Now you were on cruise control up to the time that you slammed your brakes or put your brakes on. Isn't that correct?
>
> **A:** Yes, sir.

(Tr. Vol. I, p. 235, lns. 2-5).

> **Q:** Do you still think that you'd have time to stop if you slowed down or stopped back here about A [where he first saw Johnson]?
>
> **A:** Instead of going the speed limit? I was going five miles under the speed limit. I'd slowed down to 25, if I'd known he was going across, if I'd known he was going to cross the road, maybe I wouldn't even been on the road.
>
> Q: Do you think it might have been prudent to take it off the cruise control?
>
> A: No, sir.

(Tr. Vol. I, pp. 242, 243, lns. 4-6).

As Coons was heading north on Main Street at 30 m.p.h., Johnson started to cross the street on his bicycle. Coons didn't see him until just before impact (Tr. Vol. III, p. 136, lns. 2-7). Coons swerved to the right, honked his horn, and lightly applied his brakes.[4] Johnson tried to stop his bicycle, but collided with the trailer pulled by Coons (Tr. Vol. I, p. 134, lns. 19-25; p. 139, lns. 4-22; Tr. Exs. 22-24, 33, 34, 36). Both Johnson's and Coons' experts concluded at trial that if Coons had slowed down or kept his attention on the children, the accident could have been avoided because it took Johnson 6.1 to 7.8 seconds to cross the road, and Coons only needed 3.8 to 4 seconds to stop (Tr. Vol. II, pp. 285-288, 490-493).

As a direct result of the collision, Johnson suffered extensive injuries. Prior to trial, the parties stipulated that Coons' insurance company would pay $100,000, the policy limits, if the jury found that Coons was in the least degree (1% or more) negligent (R. 60-62, a copy of which is attached in the Addendum). The Court instructed the jury that damages were not an issue, and told them that the jury only had to decide whether Coons was negligent:

---

[4]Coons did not leave any skid marks and his brakes did not disturb the leaves and dirt on the road.

> In this case, you're only gonna be called on to determine the first question: Was anybody at fault? Was anybody negligent?
>
> The other part of the question -- how much should you pay? -- has already been solved and you're not gonna be called on to solve that part of the disagreement in this case.

(Tr. Vol. I, p. 18, ln. 25; p. 19, lns. 1-6).

* * *

> In this case, the parties have reached an agreement called a stipulation, regarding the amount of damages suffered by Reynold Johnson as a result of the collision on October 27, 1989. Since the amount of damages has been agreed to by the parties, the issue of damages, which is usually for the jury to decide, will not be presented to you for decision.

(Tr. Vol. III, p. 524, lns. 16-22.)

The Court also instructed the jury that Johnson, because of his young age, was not negligent. Although it is uncontested that Coons did not keep his attention on the children or slow down, and that the accident was avoidable, the jury returned a verdict that Coons was not negligent (Tr. Vol. III, p. 529, lns. 16-17). A possible reason for the verdict is that jurors may have been sympathetic to Coons and his disabilities. In his opening statement, Coons' counsel improperly told the jury:

> You may have observed Mike Coons has been here in the courtroom today, but he doesn't look too good today. He didn't sleep last night. He went to the hospital at 5:00 this morning and got a shot of Demerol. He is in pain and

> this stems from a parachute accident he had when he was on active duty in the . . . .

(Tr. Vol. I, p. 114, lns. 21-25; p. 115, ln. 1).

Johnson's counsel then objected to the improper argument as a ploy for sympathy (Tr. Vol. I, p. 115, lns. 2-3). But the Court overruled the objection (Tr. p. 115, ln. 9). Coons' counsel continued with his plea for sympathy:

> He had a parachute accident in 1983 when he was on active duty in Ft. Bragg in the 82nd Airborne Division. He was severely injured. He had 13 surgeries and he does have a lot of pain.
>
> In October of 1989, he was feeling fairly well and it should have been a happy day for him.

(Tr. p. 115, lns. 12-18.)

During the trial, Coons' counsel continued with his plea for sympathy by obtaining the following testimony:

Mr. Henderson	Q:	You were with the 82nd Airborne Division?
Mr. Coons:	A:	Yes, sir. I was an infantry captain.
	Q:	Can you tell me how many operations you've had on your body?
	A:	13.
	Q:	Could you tell the ladies and gentlemen of the jury what happens to you when your -- what did you call them? Your -- ?
	A:	The post-traumatic.
	Q:	No, your maintenance after a couple of having you said stated to what -- the Court?

A: The word he used was disability.

Q: Your disability, yeah?

A: My mind clouds. I stutter. I can't connect thoughts together to be able to be expressive. I have a master's degree in business, but it hasn't done me much good since the [parachute] accident.

(Tr. p. 247, lns. 10-25; p. 248, lns. 1-3.)

The final error that occurred at trial was that Coons had improper contact with the jury. Specifically, twice during the trial, Coons spoke with the jury members, shook their hands, and conversed about mutual friends (R. 223-228, 253-258).

Johnson timely moved for a directed verdict, and after trial a Judgment Notwithstanding the Verdict Or in the Alternative a New Trial (R. 229-252). After the Court denied all post-trial motions, Johnson timely appealed on January 25, 1994.

VIII.

SUMMARY OF THE ARGUMENT

POINT I

Any Disciplined Review of the Undisputed Evidence Shows That Reasonable Minds Must Conclude That Coons Was Negligent.

Coons' appeal rests on these undisputed facts: (1) when Coons first saw the children, more than 200 feet away, Coons had a duty to slow down, but he did not; (2) Coons had a duty to look out for the children from the time he first saw them to the time of

impact, but he did not look out for the Johnson child; and (3) had Coons looked out for the child, he could easily have avoided the accident. As set forth in Point I of the Argument section of this Brief, since Coons unquestionably breached his duty to slow down and his duty to look out for the children, reasonable minds can only conclude that Coons was negligent.

POINT II

Improper Argument, Sympathetic Testimony, and Improper Contact With the Jury Warrant a New Trial.

Over the objections of Johnson's counsel, Coons' counsel told the jury in his opening argument that while serving in the 82nd Airborne Division, Coons suffered a parachute accident and has undergone 13 operations. The opening argument was reinforced by Coons' testimony. The foregoing was clearly an improper plea for sympathy. The parachute accident had absolutely nothing to do with the accident at issue. Moreover, it was prejudicial. The plea for sympathy coupled with the jury's disregard for Coons' admissions of negligence unquestionably show that the plea for sympathy worked.

In addition, twice during the trial, Coons approached and engaged members of the jury in conversations about mutual friends (R. 223-228). The improper conduct is presumed prejudicial. E.g., State v. Swain, 835 P.2d 1009, 1011 (Utah 1992). Moreover, since

the Court refused to require Coons to explain his contact with the jury, the presumption of prejudice was not rebutted.

IX.

ARGUMENT

POINT I

Any Disciplined Review of the Undisputed Evidence Shows That Reasonable Minds Must Conclude That Coons Was Negligent.

A. Introduction.

The Johnson child's appeal that reasonable minds must conclude that Coons was, to some degree, negligent is based on two simple premises. First, once Coons observed the children on the side of the road, he had a duty to slow down and a duty to look out for them. Second, there is no dispute that Coons breached these two duties. He did not slow down, and he did not look out for the Johnson child. Because reasonable minds cannot differ on the negligence issue, the judgment must be reversed and the case remanded for entry of a judgment notwithstanding the verdict and for further proceedings not inconsistent with such a judgment. See Kilpack v. Wignall, 604 P.2d 462, 466 (Utah 1979).

B. Coons Had A Duty to Slow Down, and a Duty to Look Out For the Johnson Child.

1. The Duty to Slow Down

Negligence is the failure to observe, for the protection of another's safety, such care, precaution and vigilance as the

circumstances justly demand. Downey v. Gemini Mining Co., 68 P.2d 414 (Utah 1902). More specifically, negligence is the breach of a duty to use due care under the circumstances. E.g., Wheeler v. Jones, 19 Utah 2d 392, 397, 431 P.2d 985 (1967). Whether a duty exists is a question of law. E.g., C.T. v. Martinez, 845 P.2d 246, 247 (Utah 1992); Trujillo v. Jenkins, 840 P.2d 777, 778 (Utah 1992). Moreover, because this case involves an injury to a child, any duty imposed by the law to protect the child is enhanced or increased. Wheeler, supra at 397. The reason the law requires a greater protection of children was explained in Kilpack, supra at 464:

> [I]t is necessary to exercise greater caution for the protection and safety of a young child than for an adult person. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, they often are thoughtless and impulsive, imposes a duty to exercise a degree of vigilance and caution commensurate with such circumstances in dealing with children.

In Utah, the law imposes upon a driver a duty of due care to all other persons on or near the highway. Malan v. Lewis, 693 P.2d 661, 672 n. 15, 673 (Utah 1984). The driver must operate his vehicle to avoid danger to himself and others. Kilpack, supra at 464. The duty to avoid danger includes a duty to slow down so that the driver can avoid impact with children who are present. See Fay

v. Kroblin Refrigerated Xpress, 644 P.2d 68, 70 (Colo. App. 1981) (when a motorist cannot stop or turn aside in time to avoid a collision with an object in his range of vision, he is negligent); c.f., Whitman v. W. T. Grant Co., 16 Utah 2d 81, 83, 395 P.2d 918 (1964) (when there is a hazard which is plainly visible, the individual is charged with a duty to heed what he saw and avoid it). The duty to reduce speed is codified in Utah Code Ann. §§ 41-6-80 and 41-6-46(1) (copies attached in the Addendum) which read, in part, as follows:

> The operator of a vehicle shall exercise care to avoid colliding with any pedestrian . . . .
>
> * * *
>
> A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing, including when: . . . (e) special hazards exist due to pedestrians, other traffic, weather or highway conditions.

2. The Duty to Look Out For the Johnson Child

Coons also had "a duty to maintain a reasonable, proper and adequate look-out and to recurrently re-observe and re-appraise the situation. Failure to do so is negligence." Anderson v. Bradley, 590 P.2d 329, 342 (Utah 1979); Badger v. Clayson, 18 Utah 2d 329, 422 P.2d 665 (1967).

A motorist has a duty to look not only straight ahead but laterally ahead as well, and to see that which is in plain sight.

Further, Coons is presumed to see what he could see by looking, and he is not permitted to escape negligence by saying that he did not see that which was in plain view. E.g., Nissen v. Johnson, 339 P.2d 651, 653 (Mont. 1959). Further, when children are involved, the duty to look out for their safety is increased. Kilpack, supra at 464.

C. Coons Did Not Slow Down, and He Did Not Look Out for the Johnson Child.

Coons' own testimony establishes, without question, that when he saw the children 200-300 feet away playing on the side of the road, he did not slow down.

Mr. Wells: Q: Now you were on cruise control up to the time that you slammed your brakes on - put your brakes on; isn't that correct?

Mr. Coons: A: Yes, sir.

(Tr. Vol. I, p. 235, lns. 2-5).

Mr. Wells: Q: Do you think it may have been prudent to take off the cruise control?

Mr. Coons: A: No, sir.

(Tr. Vol. I, p. 245, lns. 4-6).

It is impossible to marshall any evidence that Coons did slow down when he first saw the children, because there isn't any.[5]

[5]The question of negligence becomes a question of law when the whole question turns on Coons' own statements about his conduct, which conduct is negligence. In view of his statements, but one

There is no evidence of speed contrary to Coons' testimony. His own expert, Newell Knight so explained at trial.

> Mr. Henderson: Q: Now based on your training, your work experience, your education, and all that you have reviewed to prepare yourself to testify here at trial, have you formed some opinions that relate to this case?
>
> Mr. Knight: A: I have.
>
> Mr. Henderson: Q: Would you tell us what they are?
>
> * * *
>
> Mr. Knight: A: The first opinion is that there is no objective evidence to tell us what the speed of the vehicle was, the Coons vehicle. Objective means there's no skid marks. We know there were no skid marks on the road. The best evidence we have is what Mr. Coons says, "I was traveling at 30 because I've got my cruise on that. I'm going at 30."
>
> So the first opinion was that we're bound to accept 30 m.p.h. because we don't have objective data.

(Tr. Vol. II, p. 455, lns. 4-18; p. 456, lns. 5-13).

Thus, there is no factual question at all that Coons did not slow down when he first saw the children 200-300 feet away, and he proceeded at 30 m.p.h. on cruise control.

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conclusion is permissible, and that is that his conduct was negligence as a matter of law. See Taylor v. Bamberger Electric R. Co., 220 P. 695, 700 (Utah 1923).

That Coons did not continue to look out for the Johnson child after he first saw the children is also established by Coons' own testimony. Coons testified that on the day of the accident, it was light (Tr. Vol. I, p. 201, lns. 3-4), and that visibility was good (Tr. Vol. I, p. 200, ln. 20). Coons said he could see two blocks ahead (Tr. Vol. I, p. 201, ln. 20). At first, Coons tried to tell the jury that while checking his mirrors, he also kept his eye on the children.

Mr. Wells: Q: But you weren't looking directly ahead at the time, were you?

Mr. Coons: A: That is not a fair thing to say because yes, I was watching forward and staying in the same lane. But at the same time, I always glance at my mirrors.

(Tr. Vol. I, p. 205, lns. 3-19).

But on further examination, Coons admitted that he took his eyes off of the children for two to three seconds to check his mirrors, and as a result, he did not see the Johnson child start to cross the road (Tr. Vol. I, p. 233, lns. 1-4; p. 224, lns. 1-8; p. 229, ln. 25; p. 230, lns. 1-9). He further admitted that had he seen the Johnson child starting to cross the street, he could have avoided the accident.

Mr. Wells: Q: Do you believe if you had seen Ren [Johnson] sooner you could have avoided the accident?

Mr. Coons: A: Only if I'd been able to see him as he started to go.[6]

(Tr. Vol. I, p. 240, lns. 18-22.)

Again, it is impossible to marshall evidence contrary to Coons' own testimony because there isn't any. No one else knows how long Coons was distracted other than Coons himself. Moreover, what physical evidence does exist supports Coons' testimony that he was distracted. Specifically, the lack of skid marks justifies an inference against any quick action to avoid the accident. Morby v. Rogers, 202 P.2d 232, 233 (Utah 1953).

In summary, reasonable minds must conclude that based on Coons' testimony, Coons took his eyes off of the children for two to three seconds, and as a result, he was unable to avoid the collision with the Johnson child.

D. Because There is No Factual Dispute That Coons Breached His Duty to Slow Down and His Duty to Look Out For the Johnson Child, the Judgment Must Be Reversed and the Judgment N.O.V. Granted.

The issue of negligence or breach of a legal duty is normally a question of fact for the jury, but it becomes a question of law when the undisputed facts permit only one reasonable

---

[6]Coons' conclusion that had he seen the child as he started to cross the street is supported by the fact that two vehicles traveling southbound (vehicles closer to the child than Coons) were able to stop their cars in time to avoid injury (Tr. vol. I, p. 241, lns. 1-13).

conclusion. Marquez v. Pepsi Cola Bottling Co., 838 P.2d 660, 662 (Utah 1992); Kilpack, supra.

The facts in this case are essentially identical to the facts in Holmes v. Nelson 7 Utah 2d 435, 326 P.2d 722 (1958). The Nelson court stated the facts as follows:

> [T]he accident occurred about 8:20 pm. on 800 West Street in Woods Cross, which street runs north and south in front of and east of the home of plaintiff's parents. The oiled surface of the highway is approximately 38 feet 6 inches wide. The shoulders on each side are approximately 10 to 12 feet wide. The west lane of traffic of said oiled highway is 22 feet 5 inches wide, and the east lane of traffic is 16 feet 3 inches wide. The point of impact was approximately 4 feet 6 inches into the east lane of traffic. The speed limit was 30 miles per hour. Defendant was travelling northerly with his wife at a speed of 25 m.p.h. with his headlights on. (Defendant's wife warned him when 300 feet from the point of impact of the presence of children.) Defendant saw the children himself when he was 200 feet south of where the child was struck. A car approached from the north and defendant observed the children move back to permit the southbound car to pass. Defendant's car and the southbound car passed at a point about 100 to 125 feet south of the point of impact.
>
> Defendant testified that when he observed the children about 200 feet to the north he removed his foot from the gas pedal; that he did not then apply the brakes and that the removal of foot from the gas pedal did not appreciably slow him down because of a slight decline toward the north. Defendant testified that he did nothing except remove his foot from the accelerator to safeguard the children until he saw plaintiff dart into the street

> when defendant was about 75 feet from the point of impact. He did not slow down any, and did not put his foot onto the brake pedal to enable him to stop more quickly. Defendant did not remember if he sounded his horn.

7 Utah 2d at 436-37.

As in this case, the Nelson jury found the defendant driver was not negligent. The Nelson plaintiff filed a motion under Rule 59 for a new trial. The Nelson trial court correctly granted the motion and properly held that the verdict was against the preponderance of the evidence. The Supreme Court granted an interlocutory appeal and upheld the trial court. The Utah Supreme Court concluded that the accident was avoidable and that the trial court was right to grant a new trial. The similarities in the evidence between the accident in Nelson and the accident in this case are striking. Also, the failures of the driver in Nelson and of Coon in this case are nearly identical. Some of the similarities and failures are as follows:

	NELSON		COONS
1.	Accident on paved street in front of parent's home.	1.	Accident on paved highway in front of parent's home.
2.	Impact in east lanes of roadway.	2.	Impact on east side of roadway.
3.	Nelson travelling 25 m.p.h. in a 30 m.p.h. zone -- 5 m.p.h. below speed limit.	3.	Coons travelling 30 m.p.h. in 35 m.p.h. zone -- 5 m.p.h. below speed limit.

4. Nelson was aware of children 200-300 feet from point of impact.	4. Coons saw children 200-300 feet from point of impact.
5. Nelson removed foot from gas when he saw the children.	5. Coons maintained speed on cruise control when he saw children.
6. Nelson did not slow down as he approached children.	6. Coons did not slow down as he approached children.
7. Three and one-half (3½) year old child ran into street from west side of street.	7. Four and one-half (4½) year old boy rode bike into street from west side of street.
8. Nelson saw the boy enter the street and immediately braked.	8. Coons does not see child until almost one-third (1/3) way across the street.
9. Nelson testified he observed the children at such a distance that he was able to take reasonable precautions.	9. Coons testified he could have avoided the accident if he had seen the child enter the street.
10. No action to stop the vehicle or to slow it down was taken until the child darted into the street.	10. No action to avoid the accident was taken until the driver looked up and saw the boy over one-quarter (1/4) of the way across the street.
11. Nelson left 52.5 feet of skid marks.	11. Coons left no skid marks.

Given the near identity of the facts between Nelson and this case, it is clear that reasonable minds in the present case simply cannot say that Coons was not to some degree negligent. Coons' negligence is also unquestionably established by his

admitted violation of Utah Code Ann. §§ 41-6-80 and 41-6-46(1). Violations of a traffic law enacted for the safety of a class of persons to which plaintiff belongs is prima facie evidence of negligence. Gaw v. State, 798 P.2d 1130, 1135 (Utah 1990).

In summary, the standards set forth in Kilpack v. Wignall, 604 P.2d 462, 465 (Utah 1979), and the cases cited on pages 18-21 of this Brief, create a duty to look for the impulsive behavior of children. Coons' failure to do so by slowing as he approached the children and his failure to keep a constant look-out for impulsive child behavior, coupled with his admission that had he done so, the accident could have been avoided, require a reversal of the Judgment and either the entry of the Judgment n.o.v. or a new trial.

POINT II

Improper Argument, Sympathetic Testimony, and Improper Contact With the Jury Warrant a New Trial.

A. Factual and Procedural Background

Coons' opening statement told the jury that he didn't feel well because he suffered a parachute accident while serving with the 82nd Airborne Division. See pages 14-15 of this Brief, Statement of the Facts section. The jury was also told that Coons was an ex-infantry captain, and then while serving his Country, he was injured and had subsequently suffered 13 operations. As a

result, he was disabled. Even the trial judge was sympathetic to Coons' plight. For that reason, instead of placing Coons under oath, the trial judge was "willing to just ask him [whether Coons would tell the truth] rather than have him make any magic signs or anything" (Tr. Vol. I, p. 198, lns. 13-14). In addition, on the first day of the trial and on the last day of the trial, Coons approached two members of the jury, shook hands, and discussed the activities of mutual friends (R. 221-228). The Court declined to require Coons to explain his improper conduct (R. 291-293, 327-328). A split jury (6-2) subsequently found Coons not negligent, even though he failed to pay attention to the children and to slow down. Coons' counsel objected to the improper argument and counsel moved for a new trial when he learned of the improper contact. The objection was overruled and a new trial was denied (R. 327-328).

B. Legal Analysis

1. The Improper Argument Warrants a New Trial.

The trial court has the obligation of controlling the arguments presented to the jury. Hales v. Peterson, 11 Utah 2d 411, 414-415, 360 P.2d 822 (1961). Arguments appealing to sympathy and passion cannot be allowed by the courts. E.g., Eager v. Willis, 17 Utah 2d 314, 320, 410 P.2d 1003 (1966).

2. Improper Juror Contact Warrants a New Trial.

Any contact between a juror and witness, party or court personnel that is more than a brief and incidental contact raises a presumption of prejudice because of the effect of breeding a sense of familiarity that could clearly affect the juror's judgment or credibility. State v. Pike, 712 P.2d 277, 279-281 (Utah 1985). Specifically, a discussion between an officer and a juror telling about a patio cleaning accident required a new trial. Id. Similarly, a short discussion between a complaining witness and a juror led to a mistrial. State v. Swain, 835 P.2d 1009 (Utah App. 1992). Absent a satisfactory explanation, Utah and other courts presume the contact is prejudicial. As explained in California Fruit Exchange v. Henry, 89 F.Supp. 580, 588 (W.D. Pa. 1950) aff'd 184 F.2d 517 (3d Cir. 1951), the Court stated:

> [T]he courts look with suspicion upon any communications between parties to a suit or their counsel and the jury empaneled to try it; and if such communication is had and it appears a conversation was had about the suit, or the communication is not explained satisfactorily, it will, in itself, be grounds for a new trial.

The affidavits on file clearly show an attempt to ingratiate defendant with the juror and create an improper rapport. Throughout the trial, defendant acted to elicit sympathy for himself because of his "military injuries." When coupled with the improper contact shown by the affidavits, it is clear that these contacts induced six of the eight jurors to reach a verdict for

defendant which, as shown in Point I of this Brief, is contrary to the evidence.

3. The Improper Argument and Juror Contact Warrant a New Trial.

When argument brings prejudicial matter before the jury, it is reversible error unless it can be affirmatively ascertained from the record that no harm resulted. E.g., Roberts v. Lewis, 441 P.2d 350 (Okl. 1968); c.f., Ostler v. Albina Transfer Co., 781 P.2d 445 (Utah App. 1989) (improper argument negated by court's admonishment to disregard statements). However, in this case, the record demonstrates that harm occurred. For example, the Court overruled Johnson's objection to the improper argument and did not give a corrective admonishment. Great weight is given to the presence or absence of objections and corrections. Ostler, supra; Tetuan v. A. H. Robins Co., 738 P.2d 1210 (Kan. 1987). Second, the jury's failure to find any negligence at all on the part of Coons, despite his admissions, to the contrary shows that the jury was sympathetic to Coons.

Similarly, the lower court's failure to require Coons to explain his improper contact with the jurors also demonstrates the Court's sympathy toward Coons and is a failure to remove the contact's prejudicial effect. State v. Pike, supra; California Fruit Exchange, supra.

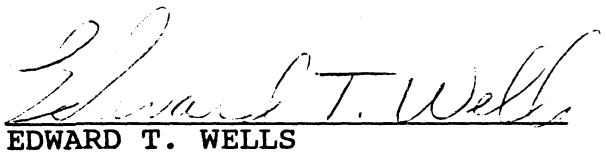
X.

CONCLUSION

Coons' testimony and all of the evidence viewed in a light favorable to the verdict conclusively show that reasonable minds must conclude that Coons was negligent. He did not slow down and he did not look out for the Johnson child. Further, Coons' improper contact with the jurors and his plea for sympathy in his opening argument require a reversal of the Judgment and either a judgment n.o.v. or a new trial.

Respectfully submitted this 30th day of December, 1994.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant



EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** (Berry v. Coons) were mailed, postage prepaid, this 30th day of December, 1994 to the following:

Robert H. Henderson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

Edward T. Wells

4083.brf/lb

ADDENDUM

1. Determinative Statutes and Rules
2. Judgment on Special Verdict
3. Order on Motion for a New Trial
4. Affidavits Showing Improper Juror Contact
5. Stipulation
6. Coons' Drawing of the Accident (Tr. Ex. 31; Depo. Ex. 1)

Tab 1

SPEED RESTRICTIONS

41-6-46. Speed regulations — Safe and appropriate speeds at certain locations — Prima facie speed limits — Rulemaking — Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing, including when:

(a) approaching and crossing an intersection or railroad grade crossing;

(b) approaching and going around a curve;

(c) approaching a hill crest;

(d) traveling upon any narrow or winding roadway; and

(e) special hazards exist due to pedestrians, other traffic, weather, or highway conditions.

41-6-80. Vehicles to exercise due care to avoid pedestrians — Audible signals and caution.

The operator of a vehicle shall exercise care to avoid colliding with any pedestrian and shall give an audible signal when necessary and exercise appropriate precaution upon observing any child or any obviously confused, incapacitated, or intoxicated person. This section supersedes any conflicting provision of this chapter or of a local ordinance.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

Tab 2

ROBERT H. HENDERSON (A1461)
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10 Exchange Place, Eleventh Floor
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Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

JUDGMENT ON SPECIAL VERDICT

Civil No. 0920600128

Judge David Mower

This case having come on regularly for jury trial on August 4, 5, and 6, 1993, and the jury having answered the Special Verdict:

1. Was the defendant Michael K. Coons negligent?

Yes _____

No X

NOW, THEREFORE, based thereon, it is hereby ORDERED, ADJUDGED, AND DECREED that: Judgment be, and hereby is entered in favor of defendant and against plaintiff, no cause of action,

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and that defendant be, and hereby is awarded costs in the amount of $ 0.00 Am.

DATED this 27 day of August, 1993.

BY THE COURT:

DAVID MOWER
DISTRICT COURT JUDGE

Approved as to form:

ROBERT J. DEBRY & ASSOCIATES

By Edward T. Wells
Edward T. Wells
Attorney for Plaintiffs

219

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Donna Campbell, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached Proposed JUDGMENT ON SPECIAL VERDICT (Case Number 0920600128, Sixth Judicial District Court in and for Sanpete County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

and causing the same to be hand-delivered on the 9th day of August, 1993.

Donna Campbell

SUBSCRIBED AND SWORN to before me this 9th day of August, 1993.

NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

7-21-94

NOTARY PUBLIC
JANEEN BEAGLEY
[illegible]
STATE OF UTAH

220

Tab 3

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY
160 North Main, Manti, Utah 84642
Telephone (801) 835-2131 Facsimile (801) 835-2121

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

ORDER ON MOTION FOR A NEW TRIAL

Case number 920600128

Judge DAVID L. MOWER

Plaintiff's motion for a new trial is denied. The motion was based on alleged improper contacts between defendant and some jurors during a time when the Court was in recess but before the matter had been submitted to the jury for decision.

The motion is denied because plaintiff failed to raise the issue in a timely fashion. Failure to object on a timely basis constitutes a waiver of the claimed error.

Signed on January 7, 1994.

David L. Mower, Judge

CERTIFICATE OF SERVICE

On January 7, 1994 a copy of the above ORDER ON MOTION FOR A NEW TRIAL was sent to each of the following by the method indicated:

FILE COPY

6.

Addressee	Method (Mail, in Person, Fax)	Addressee	Method (Mail, in Person, Fax)
Mr. Edward G. Wells 4252 South 700 East Salt Lake City, UT 84107	[M]	Mr. Robert H. Henderson 10 Exchange Place 11th Floor P.O. Box 45000 Salt Lake City, UT 84145	[M]

Tammy Moore

Tab 4

EDWARD T. WELLS 3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: 800 232-8915

IN THE SIXTH JUDICIAL DISTRICT COURT FOR SANPETE COUNTY

STATE OF UTAH
----oo0oo----

ANDREW B. BERRY, JR., as a guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,	:	AFFIDAVIT OF DOREEN JOHNSON
Plaintiffs,	:	
vs.	:	Civil No. 0920600128
MICHAEL K. COONS,	:	
	:	Assigned To: Honorable David L. Mower
Defendant.	:	

----oo0oo----

STATE OF UTAH)
:ss
COUNTY OF SANPETE)

I, Doreen Johnson, having been duly sworn, depose and state as follows:

1. I am the mother of Reynold Johnson, III.

2. The facts stated herein are based upon my knowledge and personal observation.

3. I was present in the courtroom on the first day of trial, the 5th day of August, 1993. During a recess, I observed the Defendant, Michael Coons, in the presence of the jury, approach at least two members of the jury and shake hands and engage them in conversation.

4. I was also present in the courtroom on the last day

of trial, the 6th day of August, 1993. During the final recess of the trial, while the judge and the trial lawyers were in chambers drafting jury instructions, I observed the Defendant, Michael Coons, engaging members of the jury in conversation.

5. The Defendant spoke with at least two members of the jury in the presence of all of the other members of the jury. Mr. Coons and the jury members he was talking to were speaking of common friends and discussing their mission with the Latter Day Saints Church in Israel.

6. I also observed the Defendant's wife, Mrs. Coons, speaking with the members of the jury.

7. Also discussed were other friends and family members of the Defendant's.

DATED this 6th day of September, 1993.

Doreen Johnson

DOREEN JOHNSON

SUBSCRIBED AND SWORN TO before me this 6th day of September, 1993.

Liesl H. Draper

NOTARY PUBLIC
Residing in Sanpete County,
State of Utah

My Commission Expires:
June 15 1997

NOTARY PUBLIC
LIESL H. DRAPER
546 West 200 South
Fountain Green, UT 84632
My Commission Expires
June 15th, 1997
STATE OF UTAH

EDWARD T. WELLS 3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
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Salt Lake City, Utah 84107
Telephone: 800 232-8915

IN THE SIXTH JUDICIAL DISTRICT COURT FOR SANPETE COUNTY

STATE OF UTAH
---=oo0oo----

ANDREW B. BERRY, JR., as a guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,	:	AFFIDAVIT OF ANDREW BERRY
Plaintiffs,	:	
vs.	:	Civil No. 0920600128
MICHAEL K. COONS,	:	
	:	Assigned To: Honorable David L. Mower
Defendant.	:	

----oo0oo----

STATE OF UTAH)
:ss
COUNTY OF SANPETE)

I, Andrew B. Berry, Jr., having been duly sworn, depose and state as follows:

1. I am the Plaintiff in the above-captioned action having heretofor been appointed as conservator and guardian of the minor child, Reynold Q. Johnson, III, by the Honorable Don V. Tibbs.

2. The facts stated herein are based upon my knowledge and personal observation.

3. I was present in the courtroom on the last day of trial, the 6th day of August, 1993. During the final recess of the

trial, while the judge and the trial lawyers were in chambers drafting jury instructions, I observed the Defendant, Michael Coons, engaging members of the jury in conversation.

4. The Defendant spoke with at least two members of the jury in the presence of all of the other members of the jury. Mr. Coons and the jury members he was talking to were speaking of common friends and discussing their mission with the Latter Day Saints Church in Israel.

5. Also discussed were other friends and family members of the Defendant's.

DATED this 6th day of September, 1993.

ANDREW B. BERRY, JR.

SUBSCRIBED AND SWORN TO before me this 6th day of September, 1993.

NOTARY PUBLIC
Residing in Sanpete County,
State of Utah

My Commission Expires:
June 15 1997

NOTARY PUBLIC
LIESL H. DRAPER
546 West 200 South
Fountain Green, UT 84632
My Commission Expires
June 15th, 1997
STATE OF UTAH

EDWARD T. WELLS 3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: 800 232-8915

IN THE SIXTH JUDICIAL DISTRICT COURT FOR SANPETE COUNTY

STATE OF UTAH
----ooOoo----

ANDREW B. BERRY, JR., as a guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,	:	AFFIDAVIT OF LIESL H. DRAPER
Plaintiffs,	:	
vs.	:	Civil No. 0920600128
MICHAEL K. COONS,	:	
	:	Assigned To: Honorable David L. Mower
Defendant.	:	

----ooOoo----

STATE OF UTAH)
:ss
COUNTY OF SANPETE)

I, Liesl H. Draper, having been duly sworn, depose and state as follows:

1. I am the legal assistant for Andrew B. Berry, Jr., attorney at law.

2. The facts stated herein are based upon my knowledge and personal observation.

3. I was present in the courtroom on the last day of trial, the 6th day of August, 1993. During the final recess of the trial, while the judge and the trial lawyers were in chambers drafting jury instructions, I observed the Defendant, Michael

Coons, engaging members of the jury in conversation.

4. The Defendant spoke with at least two members of the jury in the presence of all of the other members of the jury. Mr. Coons and the jury members he was talking to were speaking of common friends and discussing their mission with the Latter Day Saints Church in Israel.

5. Also discussed were other friends and family members of the Defendant's.

DATED this 7th day of September, 1993.

LIESL H. DRAPER

SUBSCRIBED AND SWORN TO before me this 7th day of September, 1993.

NOTARY PUBLIC
Residing in Sanpete County,
State of Utah

My Commission Expires:
9-18-96

NOTARY PUBLIC
YVONNE A. HOWELL
Commission Expires
9-18-96
STATE OF UTAH

Tab 5

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiffs, vs. MICHAEL K. COONS, Defendant.	STIPULATION, MOTION AND ORDER Civil No. 0920600128 Judge David Mower

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STIPULATION AND MOTION

The plaintiff, by and through his guardian and by and through his counsel of record, and the defendant, by and through his counsel of record, hereby stipulate to try this case on liability only, submitting the case to the jury on a special verdict form which shall pose two questions:

1. Was Michael K. Coons negligent? (and if the answer is "yes")

2. Was the negligence of Michael K. Coons a proximate cause of the injuries of plaintiff?;

and, in the event the jury answers yes to both questions, to settle the case for $100,000. The parties move the Court for an Order in accordance with this Stipulation.

DATED this 2nd day of June, 1993.

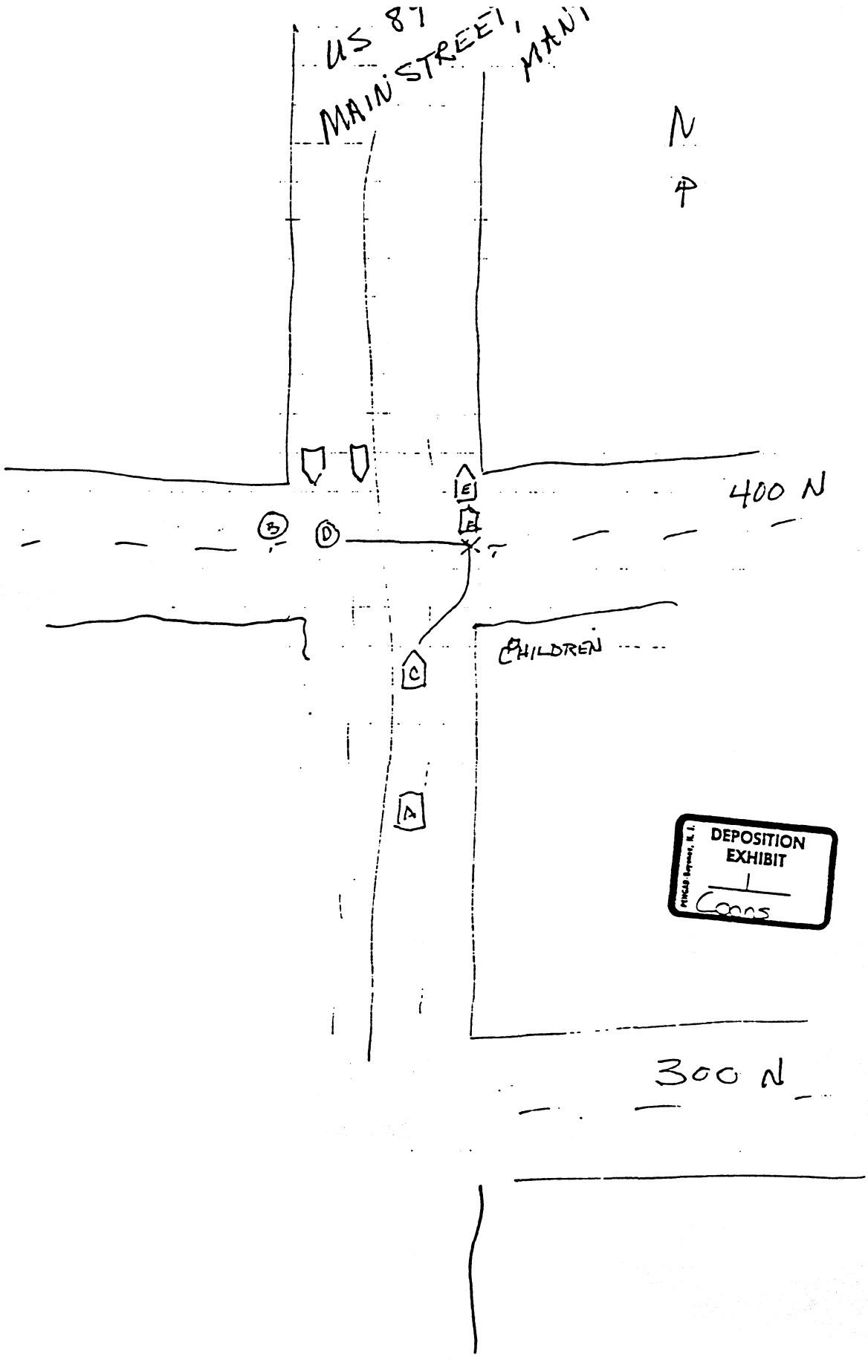
ROBERT J. DEBRY & ASSOCIATES

By: _____
EDWARD T. WELLS
Attorneys for Plaintiff

SNOW, CHRISTENSEN & MARTINEAU

By _____
Robert H. Henderson
Attorneys for Defendant

Tab 6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